IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

JONATHAN CASTRO-RONDON,	:	CRIMINAL ACTION
	:	NO. 12-296
Petitioner,	:	
	:	CIVIL ACTION
v.	:	NO. 13-6026
	:	
UNITED STATES OF AMERICA,	:	
	:	
Respondent.	:	

M E M O R A N D U M

EDUARDO C. ROBRENO, J. November 12, 2014

Pro se Petitioner Jonathan Castro-Rondon ("Castro-Rondon" or "Petitioner"), a federal prisoner, seeks habeas relief under 28 U.S.C. § 2255. Petitioner claims that his plea and sentencing counsel, Laurence Narcisi, Esquire ("Counsel"), provided ineffective assistance of counsel in violation of the Sixth Amendment when he failed to honor Petitioner's request to file a post-sentencing appeal. For the reasons set forth below, the Court will order an evidentiary hearing to determine whether Petitioner's motion should be granted or denied.

I. BACKGROUND

On August 24, 2012, Castro-Rondon pled guilty to one count of reentry after deportation, in violation of 8 U.S.C. § 1326(a) and (b)(2) (Count One). ECF No. 13; see also Indictment, ECF No. 1. The plea was not accompanied by a plea

agreement with the Government. Guilty Plea Mem. 1, ECF No. 12. On February 13, 2013, this Court sentenced Castro-Rondon. Because he had previously been deported subsequent to a conviction for commission of an aggravated felony, the offense carried a statutory maximum penalty of 20 years imprisonment. Gov't's Sentencing Mem. 3; see also 8 U.S.C. § 1326(b)(2). Per the Sentencing Guidelines, and considering the particulars of this case and Castro-Rondon's criminal history, the advisory sentencing range was 46 to 57 months in prison. Gov't's Sentencing Mem. 3. The Court imposed a sentence of 48 months imprisonment. Judgment, ECF No. 22. No appeal was filed.

On December 27, 2013, Castro-Rondon, as pro se petitioner, filed a timely § 2255 petition, requesting that the Court vacate, set aside, or correct his sentence.[1] Aff. & Mem. Law Supp. Mot. 1, ECF No. 30. He claims that Counsel was constitutionally ineffective when he failed to file a notice of appeal pursuant to Castro-Rondon's request, made immediately after sentencing. Id. at 2, 4.[2] The Government responded on

[1] Castro-Rondon initially filed his § 2255 petition on October 16, 2013, but the Court dismissed it without prejudice for failure to file it on the correct form. Order, ECF No. 29

[2] In his petition, Castro-Rondon claims he was induced to execute a plea agreement with the Government. Id. at 5. The Government's response (ECF No. 32), the Guilty Plea Memorandum (ECF No. 12), and a docket search all establish that Castro-Rondon pled open and not pursuant to any operative plea

January 15, 2014 (ECF No. 32), and Castro-Rondon filed a reply on March 3, 2014 (ECF No. 33). The petition is now ripe for resolution.

II. LEGAL STANDARD

A federal prisoner "claiming the right to be released . . . may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255. Such a

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agreement. It seems Castro-Rondon was mistaken about any such agreement; the Court will proceed on this understanding. In addition, Castro-Rondon claims that Counsel promised him a maximum sentence of 12 to 18 months. Id. at 5. Even though this allegation does not seem to form the basis of the claim, the Court will briefly consider it. The Government provides ample support that, in the Third Circuit, an attorney's inaccurate sentencing predictions do not rise to the level of ineffective assistance if the Court provides the appropriate warnings during the plea colloquy. Gov't's Mot. Dismiss 5; see also Davies v. Tennis, No. 09-3461, 2010 WL 2569238, at *1 n.3 (E.D. Pa. June 21, 2010) ("[I]t is well established that counsel's inaccurate sentencing predictions do not constitute ineffective assistance of counsel where an adequate hearing is conducted."); United States v. Jones, 336 F.3d 245, 254 (3d Cir. 2003) (rejecting a claim of ineffective assistance of counsel where the district court conducted a guilty plea hearing in which it "warned [the defendant] of the maximum sentences accompanying the charged offenses and specifically advised [the defendant] that he would not be permitted to withdraw his guilty plea should his sentence be in excess of that recommended by his counsel, the Government, or the probation office"). As the Government notes, the Court in its plea colloquy with Petitioner adequately explained the statutory maximum sentence, warned that the Guidelines are advisory, outlined the consequences of the guilty plea, and obtained Petitioner's assent that he understood. Gov't's Mot. Dismiss 5; Guilty Plea Tr. 18:1-20:16. The colloquy thus clearly dispelled any effect of Counsel's alleged prior sentencing predictions; to the extent Petitioner bases his claim on these predictions, it fails.

prisoner may attack his sentence on any of the following grounds: (1) the sentence was imposed in violation of the Constitution or laws of the United States; (2) the court was without jurisdiction to impose the sentence; (3) the sentence was in excess of the maximum authorized by law; or (4) the sentence is otherwise subject to collateral attack. Id. An evidentiary hearing on the merits of a prisoner's claims is necessary unless it is clear from the record, viewed in the light most favorable to the petitioner, that he is not entitled to relief. § 2255(b). The court is to construe a prisoner's pro se pleading liberally, Erickson v. Pardus, 551 U.S. 89, 94 (2007) (per curiam), but "vague and conclusory allegations contained in a § 2255 petition may be disposed of without further investigation," United States v. Thomas, 221 F.3d 430, 437 (3d Cir. 2000).

A § 2255 petition can be based upon a violation of the Sixth Amendment right to effective assistance of counsel. See Strickland v. Washington, 466 U.S. 668, 686, 697 (1984). By claiming his counsel was ineffective, a defendant attacks "the fundamental fairness of the proceeding." Id. at 697. Therefore, as "fundamental fairness is the central concern of the writ of habeas corpus," "[t]he principles governing ineffectiveness claims should apply in federal collateral proceedings as they do on direct appeal or in motions for a new trial." Id. Those

principles require a convicted defendant to establish both that (1) his counsel's performance was deficient, and (2) the deficient performance prejudiced his defense. Id. at 687.

To prove deficient performance, a petitioner must show that his "counsel's representation fell below an objective standard of reasonableness." Id. at 687-88. The court's "scrutiny of counsel's performance must be highly deferential." Id. at 689. Accordingly, there is a "strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance." Id. In raising an ineffective assistance claim, the petitioner must first identify the acts or omissions alleged not to be the result of "reasonable professional judgment." Id. at 690. Next, the court must determine whether those acts or omissions fall outside of the "wide range of professionally competent assistance." Id.

To prove prejudice, a convicted defendant must affirmatively prove that the alleged attorney errors "actually had an adverse effect on the defense." Id. at 693. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Id. at 694.

III. DISCUSSION

As stated above, Petitioner's claim is based on his allegation that he directed Counsel to file a notice of appeal but that Counsel failed to do so in a timely manner, thus forfeiting Petitioner's appeal. In what follows, the Court will assess the claim's viability under Strickland before moving on to evidentiary matters.

A. Application of the Strickland Factors

In evaluating whether an attorney's performance was constitutionally ineffective, the Court must first determine whether the performance was deficient--whether it fell below an objective standard of reasonableness. Strickland, 466 U.S. at 687-88. Here, Petitioner alleges that Counsel failed to file an appeal after Petitioner explicitly instructed him to do so. The Supreme Court has addressed this exact scenario: "We have long held that a lawyer who disregards specific instructions from the defendant to file a notice of appeal acts in a manner that is professionally unreasonable." Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (citing Rodriquez v. United States, 395 U.S. 327 (1969)). With controlling law so strongly on point, Petitioner's allegation clearly satisfies the first step of the Strickland analysis.

In applying the second Strickland step, the Court must determine whether the attorney's deficient performance prejudiced Petitioner's defense--that is, whether the deficiency caused an adverse effect on the defense. Strickland, 466 U.S. at 693-94. Again, the Supreme Court has specifically addressed the instant situation. In Flores-Ortega,[3] it spoke to the prejudice inherent in an attorney's failure to file an appeal at the defendant's direction:

> [C]ounsel's alleged deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself. According to respondent, counsel's deficient performance deprived him of a notice of appeal and, hence, an appeal altogether. Assuming those allegations are true, counsel's deficient performance has deprived respondent of more than a fair judicial

[3] In Flores-Ortega, the petitioner's counsel failed to file a notice of appeal, thus forfeiting the appeal. Id. at 473-74. It was unclear to what extent counsel had previously discussed with petitioner the decision to file an appeal. Id. at 474-76. The ultimate question before the Court was the following: "Under what circumstances does counsel have an obligation to consult with the defendant about an appeal?" Id. at 478. In answering this question, the Court held that counsel must consult with a petitioner about an appeal when either (1) "a rational defendant would want to appeal," or (2) "this particular defendant reasonably demonstrated to counsel that he was interested in appealing." Id. at 480. Applying the Strickland test, the Court found that, in order for the petitioner to satisfy the prejudice prong, he must "demonstrate that, but for counsel's deficient conduct, he would have appealed." Id. at 486. Although the Supreme Court's objective in this case--determining exactly whether and when counsel's failure to discuss an appeal with a defendant amounts to unconstitutionally ineffective assistance--is different from the instant case, its consideration of a petitioner's burden to show prejudice is nevertheless relevant here.

> proceeding; that deficiency deprived respondent of the appellate proceeding altogether. . . . The . . . serious denial of the entire judicial proceeding itself, which a defendant wanted at the time and to which he had a right, similarly demands a presumption of prejudice.

528 U.S. at 483.

On its face, Counsel's failure to file an appeal carries with it a presumption of prejudice. Petitioner had just been sentenced and was returning to federal detention en route to his prison term; if he indeed instructed Counsel to file a notice of appeal, he reasonably relied on Counsel's doing so. See id. at 477 ("[A] defendant who instructs counsel to initiate an appeal reasonably relies upon counsel to file the necessary notice."). Accordingly, Counsel's failure to file a notice of appeal deprived Petitioner of his right to an "appellate proceeding altogether." Under the Flores-Ortega standard, this Court may presume prejudice.

The Government rejects this view, arguing that Petitioner "has failed to establish that he was prejudiced by counsel's failure" to file an appeal. Gov't's Mot. Dismiss 6. The Government argues that, because Petitioner's sentence was toward the low end of the Guidelines range, his appeal would likely have failed and, thus, his defense suffered no prejudice when Counsel allegedly failed to follow Petitioner's instructions. Id. The question this Court must answer is whether

the weakness of Petitioner's forfeited appeal should overcome the presumption of prejudice. The Supreme Court has considered this question. In Rodriquez, the petitioner's attorney similarly failed to appeal before the appeal period expired. 395 U.S. at 328. The district court and the Ninth Circuit both denied relief under § 2255, citing the petitioner's failure "to disclose what errors [he] would raise on appeal and to demonstrate that denial of an appeal had caused prejudice." Id. at 329. The Supreme Court reversed, writing: "Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings." Id. at 330; see also id. 329-30 ("As this Court has noted before, '[p]resent federal law has made an appeal from a District Court's judgment of conviction in a criminal case what is, in effect, a matter of right." (quoting Coppedge v. United States, 369 U.S. 438, 441 (1962))).

In Flores-Ortega, the Court incorporated the Rodriquez decision into its Strickland analysis and noted: "We similarly conclude here that it is unfair to require an indigent, perhaps pro se, defendant to demonstrate that his hypothetical appeal might have had merit . . . . Rather, we require the defendant to demonstrate that, but for counsel's deficient conduct, he would

have appealed." 528 U.S. at 486;[4] see also Peguero v. United States, 526 U.S. 23, 28 (1999) ("[W]hen counsel fails to file a requested appeal, a defendant is entitled to resentencing and to an appeal without showing that his appeal would likely have had merit."); id. at 30 (O'Connor, J., concurring) ("To require defendants to specify the grounds for their appeal and show that they have some merit would impose a heavy burden on defendants who are often proceeding pro se in an initial 28 U.S.C. § 2255 motion.").

In light of the Supreme Court precedent outlined above, this Court will not consider the relative merits (or lack thereof) of Petitioner's forfeited appeal. If Counsel truly disregarded Petitioner's specific instruction to appeal, Counsel's performance was deficient, Petitioner is presumed to have suffered prejudice, and Petitioner has successfully brought a claim for ineffective assistance of counsel under the Sixth Amendment.

[4] As noted earlier, the central question in Flores-Ortega was whether the petitioner's attorney performed deficiently when he did not appeal and the petitioner did not provide clear instructions one way or the other. Id. at 477. Although the facts are slightly different, the Court's underlying reasoning--that a petitioner need not show the merits of his forfeited appeal in order to obtain relief--is applicable to the present action.

B. Evidentiary Matters

Having resolved the legal issue, the only question left for this Court to consider is a factual one: whether or not Petitioner directed Counsel to file a notice of appeal. Petitioner and the Government submit conflicting evidence on this question. Petitioner asserts that "he explicitly requested his counsel to appeal. It occurred before he was removed from the courtroom." Aff. & Mem. Law Supp. Mot. 2. He attaches his sworn affidavit, in which he states the following:

> On February 13, 2013, when the hearing of my sentence concluded, I was unsatisfied and very frustrated with the term of 48 months imprisonment received therefore [sic], requested [sic] my counsel to appeal. Prior to being removed from the courtroom, I specifically instructed and requested my counsel to submit an appeal on my behalf.

Id. App. A, ¶ 8. Petitioner also includes a letter he sent to the Clerk of Court on September 16, 2013, inquiring about the status of his appeal and noting that Counsel had not responded to his phone calls. Id. App. B.

The Government attaches Counsel's affidavit, in which he states that he does not recall having a discussion with Petitioner regarding filing an appeal. Gov't's Mot. Dismiss App. A, ¶ 8. In addition, Counsel affirms that he discussed the sentencing with Petitioner's family, and that they did not "express a desire that [he] appeal the sentence." Id. ¶ 9-10. Counsel points out that he and Petitioner never discussed the

"fees and cost for an appeal." Id. ¶ 11. Finally, Counsel believes that "there would not have been a good faith basis to file an appeal." Id. ¶ 12.

Under § 2255, an evidentiary hearing is required "unless it is clear from the record, viewed in the light most favorable to the petitioner, that he is not entitled to relief." 28 U.S.C. § 2255(b). Viewed in such a light, the Court concludes that an evidentiary hearing is warranted in this case. See Solis v. United States, 252 F.3d 289, 295 (3d Cir. 2001) (holding that "when a defendant is convicted of a crime and alleges that his lawyer failed to appeal the conviction, and there is a potential factual dispute on this issue, the defendant is entitled to a hearing before the District Court to prove that he made the request and that the lawyer failed to honor it").

IV. CONCLUSION

For the foregoing reasons, the Court will schedule an evidentiary hearing on the merits under 28 U.S.C. § 2255 in order to determine whether Petitioner's motion should be granted or denied. An appropriate order follows.

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	:	
Respondent.	:	

O R D E R

AND NOW, this **12th** day of **November, 2014,** upon consideration of Petitioner's motion for relief under 28 U.S.C. § 2255 (ECF No. 30), it is hereby **ORDERED** that an evidentiary hearing will be scheduled in this matter.

It is **FURTHER ORDERED** that the Court will appoint counsel for Petitioner.

And it is so ordered.

/s/ Eduardo C. Robreno
EDUARDO C. ROBRENO, J.